

E-FILED - 12/22/08

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RICHARD B. HALL,)	No. C 06-2808 RMW (PR)
)	
Petitioner,)	ORDER DENYING
)	PETITION FOR WRIT
vs.)	OF HABEAS CORPUS
)	
LARRY SCRIBNER, Warden,)	
)	
Respondent.)	
_____)	

Petitioner, a state prisoner proceeding pro se, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The court ordered respondent to show cause why the petition should not be granted. Respondent has filed an answer addressing the merits of the petition, and petitioner has filed a traverse. Having reviewed the briefs and the underlying record, the court concludes that petitioner is not entitled to relief based on the claims presented and denies the petition.

BACKGROUND

In 1999, petitioner and Ericka Ryan met in Louisville, Kentucky. (Resp. Ex. I (People v. Hall, California Court of Appeal, First Appellate District, Division Four, Case No. A094198, September 30, 2003) at 1.) Petitioner and Ryan were living with petitioner's friend, Mickey Parsons. (Id. at 2.) Parsons and petitioner discussed moving to Florida because petitioner had warrants out for his arrest relating to child support payments. (Id.) Petitioner and Parsons later

1 had a falling out after Parsons changed his mind about traveling to Florida, and Ryan and
2 petitioner left for California instead. (Id.) Petitioner and Ryan traveled by car for several days
3 with money obtained from Ryan's family, from pawning petitioner's golf clubs, and from Ryan
4 "working the truckers" for money and drugs. (Id.) Once they arrived in California, they stayed
5 with Ryan's brother, (id.), and both found odd jobs, (id. at 3).

6 In August, they decided to leave California, took a bus to Oregon, and got off in Orick,
7 Oregon. (Id.) They had little to no money leftover, and spent the next two days walking around,
8 eating nothing and sleeping outdoors. (Id.) According to petitioner, Ryan talked about stealing
9 a purse or backpack. (Id. at 3-4.) They wandered into Lost Man Creek parking area, and
10 encountered the victim, David Schauer, who approached petitioner and Ryan and began talking
11 to them. (Id. at 4.) At this point, Ryan's version of events are markedly different from
12 petitioner's version of events. (Id.)

13 Ryan testified that petitioner spoke with Schauer briefly before Schauer walked up one of
14 the trails. (Id.) When they ran into him again coming down the trail, Ryan and petitioner
15 "communicated through their eyes," leading her to understand that petitioner was going to choke
16 Schauer.¹ (Id.) Ryan testified that petitioner ran at Schauer from behind and they both fell
17 down. (Id.) Ryan heard a "gurgle" or something and she believed petitioner was choking
18 Schauer and began walking down to the parking area. (Id.) After hearing something strange,
19 she turned around and saw Schauer looking at her while petitioner was "stomping on his head,"
20 and watched him do that three times before she turned again and walked away. (Id.) Petitioner
21 later caught up with her and threw Schauer's video camera and jacket into the woods. (Id. at 5.)
22 Petitioner had Schauer's key to his Isuzu, Schauer's driver's license, a bag of marijuana, and \$60
23 in cash. (Id.) They got into Schauer's Isuzu and drove out of the area. (Id.)

24 Petitioner testified that Schauer had approached them and seemed "stoned." (Id.)
25 Schauer invited them up the mountain to smoke marijuana, and while petitioner did not smoke
26

27 ¹ Petitioner previously had conversations with Ryan and Parsons regarding his ability to
28 "choke 'em out," meaning that he knew how to render a person unconscious by applying a hold
which closed off the carotid arteries in the neck. (Id. at 2.)

1 Under the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”), a district court
2 may not grant a petition challenging a state conviction or sentence on the basis of a claim that
3 was reviewed on the merits in state court unless the state court’s adjudication of the claim
4 “(1) resulted in a decision that was contrary to, or involved an unreasonable application of,
5 clearly established federal law, as determined by the Supreme Court of the United States; or (2)
6 resulted in a decision that was based on an unreasonable determination of the facts in light of the
7 evidence presented in the state court proceeding.” 28 U.S.C. § 2254(d). The first prong applies
8 both to questions of law and to mixed questions of law and fact, Williams v. Taylor, 529 U.S.
9 362, 384-86 (2000), while the second prong applies to decisions based on factual determinations,
10 Miller-El v. Cockrell, 537 U.S. 322, 340 (2003).

11 “Under the ‘contrary to’ clause, a federal habeas court may grant the writ if the state
12 court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of
13 law or if the state court decides a case differently than [the] Court has on a set of materially
14 indistinguishable facts.” Williams, 529 U.S. at 412-13. A state court decision is an
15 “unreasonable application of” Supreme Court authority, falling under the second clause of
16 § 2254(d)(1), if the state court correctly identifies the governing legal principle from the
17 Supreme Court’s decisions but “unreasonably applies that principle to the facts of the prisoner’s
18 case.” Id. at 413. The federal court on habeas review may not issue the writ “simply because
19 that court concludes in its independent judgment that the relevant state-court decision applied
20 clearly established federal law erroneously or incorrectly.” Id. at 411.

21 Under 28 U.S.C. § 2254(d)(2), a state court decision “based on a factual determination
22 will not be overturned on factual grounds unless objectively unreasonable in light of the
23 evidence presented in the state-court proceeding.” Miller-El, 537 U.S. at 340. The court must
24 presume correct any determination of a factual issue made by a state court unless the petitioner
25 rebuts the presumption of correctness by clear and convincing evidence. See 28 U.S.C. §
26 2254(e)(1).

27 In determining whether the state court’s decision is contrary to, or involved an
28 unreasonable application of, clearly established federal law, a federal court looks to the decision

1 of the highest state court to address the merits of a petitioner's claim in a reasoned decision.
2 LaJoie v. Thompson, 217 F.3d 663, 669 n.7 (9th Cir. 2000). The standard of review under the
3 AEDPA is somewhat different where the state court gives no reasoned explanation of its
4 decision on a petitioner's federal claim and there is no reasoned lower court decision on the
5 claim. When confronted with such a decision, a federal court should conduct "an independent
6 review of the record" to determine whether the state court's decision was an objectively
7 unreasonable application of clearly established federal law. Richter v. Hickman, 521 F.3d 1222,
8 1229 (9th Cir. 2008).

9 **B. Petitioner's Claims**

10 1. Ineffective assistance of trial counsel

11 Petitioner claims that counsel provided ineffective assistance because he failed to have
12 DNA and fingerprint analysis conducted on items recovered from the crime scene to establish
13 that (1) Ryan had physical contact with items used to kill Schuaer and the concealing of
14 Schauer's body, and (2) that Ryan had physical contact with Schauer. (Petition at 1-3.)
15 Petitioner opines that had counsel conducted this testing for Ryan's DNA or fingerprints on
16 some unspecified item(s) recovered from the crime scene, and had the testing discovered
17 evidence of Ryan's DNA or fingerprints, the jury would have understood that Ryan's testimony,
18 placing her far away from the crime scene, was false, and would have credited petitioner's
19 testimony instead. (Petition at 1-3.)

20 A claim of ineffective assistance of counsel is cognizable as a claim of denial of the Sixth
21 Amendment right to counsel, which guarantees not only assistance, but effective assistance of
22 counsel. Strickland v. Washington, 466 U.S. 668, 686 (1984). The benchmark for judging any
23 claim of ineffectiveness must be whether counsel's conduct so undermined the proper
24 functioning of the adversarial process that the trial cannot be relied upon as having produced a
25 just result. Id.

26 In order to prevail on a Sixth Amendment ineffectiveness of counsel claim, petitioner
27 must establish two things. First, he must establish that counsel's performance was deficient, i.e.,
28 that it fell below an "objective standard of reasonableness" under prevailing professional norms.

1 Id. at 687-88. Second, he must establish that he was prejudiced by counsel's deficient
2 performance, i.e., that "there is a reasonable probability that, but for counsel's unprofessional
3 errors, the result of the proceeding would have been different." Id. at 694. A reasonable
4 probability is a probability sufficient to undermine confidence in the outcome. Id.

5 Assuming without deciding that counsel was deficient,² petitioner fails to demonstrate
6 prejudice from his claim. See id. at 697 ("If it is easier to dispose of an ineffectiveness claim on
7 the ground of lack of sufficient prejudice, . . . that course should be followed."). At trial, the
8 state presented DNA evidence demonstrating that blood at the scene of the crime originated from
9 Schauer, and not from petitioner or Ryan. (Resp. Ex. H-1.) Further, the state presented DNA
10 test results eliminating Ryan as the source of any non-sperm evidence that was gathered from
11 Schauer's penile swab and underpants. (Resp. Ex. H-2.)

12 Petitioner proffers no evidence that Ryan's DNA or fingerprints would have been
13 discovered had counsel conducted any additional tests. Furthermore, petitioner does not specify
14 which items from the crime scene he believed counsel should have tested for Ryan's DNA or
15 fingerprints, apart from the blood and the victim's clothing that were already tested by the
16 prosecutor. In short, petitioner merely alleges that *if* counsel had conducted tests on unspecified
17 items from the crime scene, and *if* they had shown Ryan's fingerprints or DNA, the results would
18 have undermined Ryan's testimony and the outcome of trial would have been different. Such
19 speculation is insufficient to establish prejudice. See Gonzalez v. Knowles, 515 F.3d 1006,
20 1015-16 (9th Cir. 2008) (concluding insufficient showing of prejudice based on speculative
21 claim that counsel was ineffective for failing to investigate potential mitigating factors based on
22 mental health when petitioner failed to allege any mental health defect).

23 Even if any additional tests would have resulted in the finding of Ryan's DNA or
24 _____

25 ² While petitioner's direct appeal was pending, he filed a post-conviction motion to
26 appoint counsel for the purpose of requesting DNA testing under California Penal Code § 1405.
27 (Resp. Ex. H-3.) The trial court appointed trial counsel to investigate whether such a motion was
28 warranted and if it were, to file one. (Resp. Ex. H-4.) Petitioner objected to the appointment of
trial counsel, and now claims that counsel's subsequent filing of a motion for DNA testing is a
concession by counsel that he performed deficiently at trial by not requesting such testing
previously. (Petition at 1-3.)

1 fingerprints, petitioner fails to demonstrate a “reasonable probability that, but for counsel’s
2 unprofessional errors, the result of the proceeding would have been different.” Strickland, 466 at
3 694. The post-mortem evidence showed that it was physically unlikely that Ryan inflicted the
4 mortal wounds. While Ryan was 5 feet tall, 130 pounds, Schauer was 6-feet, 150 pounds, and
5 suffered a choking injury to his neck, consistent with the perpetrator having used considerable
6 force to result in unconsciousness. (RT 492, 498-500, 517.) Petitioner alleges that any finding
7 of Ryan’s DNA or fingerprints on items recovered from the crime scene would necessarily cause
8 the jury to believe his version of events and not Ryan’s. However, any such finding would not
9 necessarily even serve to impeach Ryan’s testimony as her DNA or fingerprints might have
10 shown up on Schauer’s clothing when she and petitioner first encountered Schauer on the trail.

11 In light of the above, and after a thorough and independent review of the underlying
12 record, this court concludes that petitioner has not shown that he was prejudiced by counsel’s
13 alleged failure to conduct additional scientific tests on items recovered from the crime scene.
14 Petitioner fails to establish a reasonable likelihood that but for counsel’s failure to conduct
15 testing, the results of the proceeding would have been different. The state court’s denial of this
16 claim was not contrary to or an unreasonable application of clearly established federal law. See
17 Richter v. Hickman, 521 F.3d 1222, 1229 (9th Cir. 2008).

18 2. Impartial jury

19 Petitioner claims that he was denied his constitutional right to an impartial jury because
20 the trial court failed to adequately investigate a juror’s assertion that his wife received a phone
21 call from the jail in which petitioner was housed, failed to determine what that juror said to other
22 jurors regarding the call, and failed to admonish the juror not to discuss the matter with other
23 jurors. (Petition at 2-2 - 2-4.)

24 During trial, and out of the presence of the jury, juror 102820 informed the court that his
25 wife received a collect call from an unidentified inmate at the county jail where petitioner was
26 currently housed. (RT 730, 734-36.) She did not accept the charges and hung up without
27 speaking with anyone. (RT 735-36.) The court asked juror 102820 if there was anything about
28 that call that would affect his ability to be fair or impartial, to which the juror responded in the

1 negative. (RT 736.) The juror further stated that he could decide the case solely on the evidence
 2 presented in the courtroom. (RT 736.) Two days later, the parties stipulated to the excusal of
 3 juror 102820 because he became ill and needed emergency surgery. (RT 1566.)

4 During jury deliberation, upon request of defense counsel, the court asked juror 102820,
 5 who was still recovering in the hospital from his surgery, whether he had ever spoken to other
 6 jurors about the phone call received by his wife. (RT 2200.) The court informed the parties
 7 what it proposed to tell the jury and both parties agreed with the proposed statements. (RT 2200-
 8 02.) The court called the jury in from deliberations where the following occurred:

9 THE COURT: Good morning. We are in session in People versus
 10 Richard Hall. Mr. Hall, both counsel, and the twelve jurors are present.
 11 We figured you wouldn't want to come in here and leave all of the
 12 goodies that are in your room in there. I'll try to keep the bailiffs away
 13 while you're in here. We did have one brief issue I wanted to discuss
 14 with you, and then we'll let you go back to your deliberations. During
 15 the trial, one of the jurors, it was (102820), who was the gentlemen [sic]
 16 that became ill, indicated that he had received a telephone call during the
 17 trial that was allegedly from the jail. And apparently he may have
 18 mentioned that to one or more of you. I can indicate by the way that
 19 (102820) is doing very well. So I thought you might like to know that.
 20 What I wanted to tell you was that it was determined that that telephone
 call was not from the jail. It had nothing to do with this case. It had
 nothing to do with anyone associated with this case. And I wanted to
 then ask, is there anyone on the jury panel who thinks that what they
 heard from (102820) about this phone call that was determined not to
 have anything to do with this case would in any way affect your ability
 to be fair and impartial? And if so, would ask you to raise your hand.
 Seeing no hands then, and I'll ask for a show again, does everybody
 agree that whatever it was about this – and most of you probably never
 even heard of it – that that would in no way affect your ability to be fair
 and impartial? Everybody agree with that? Everyone's raising their
 hand. Either counsel have anything more on this issue?

21 (RT 2201-02.)

22 The Sixth Amendment guarantees to the criminally accused a fair trial by a panel of
 23 impartial jurors. U.S. Const. amend. VI; see Irvin v. Dowd, 366 U.S. 717, 722 (1961). “Even if
 24 only one juror is unduly biased or prejudiced, the defendant is denied his constitutional right to
 25 an impartial jury.” Tinsley v. Borg, 895 F.2d 520, 523-24 (9th Cir. 1990) (internal quotations
 26 omitted). However, the Constitution “does not require a new trial every time a juror has been
 27 placed in a potentially compromising situation.” Smith v. Phillips, 455 U.S. 209, 217 (1982).

28 “Clearly established federal law, as determined by the Supreme Court, does not require

1 state or federal courts to hold a hearing every time a claim of juror bias is raised by the parties.”
2 Tracey v. Palmateer, 341 F.3d 1037, 1045 (9th Cir. 2003). Relying on Remmer v. United States,
3 347 U.S. 227 (1954) and Smith v. Phillips, 455 U.S. 209 (1982), the Ninth Circuit has held that
4 “[a] court confronted with a colorable claim of juror bias must undertake an investigation of the
5 relevant facts and circumstances.” Dyer v. Calderon, 151 F.3d 970, 974 (9th Cir. 1998) (en
6 banc). All that due process requires is that “all parties be represented, and that the investigation
7 be reasonably calculated to resolve the doubts raised about the juror’s impartiality.” Id. at 974-
8 75.

9 Here, the court explained to the jury, with the approval of both parties, that the phone call
10 in fact did not come from the jail, and asked if any juror believed that the facts surrounding the
11 phone call would influence his or her impartiality or affect his or her ability to remain fair and
12 impartial. (RT 2201-02.) Petitioner has not presented any evidence that the trial judge failed to
13 adequately consider whether the jurors’ ability to deliberate impartially was likely to be affected
14 by information regarding an alleged phone call.

15 Even if the trial judge had not conducted a sufficient investigation, petitioner cannot
16 show prejudiced. Habeas relief is warranted only if the constitutional error at issue had a
17 “substantial and injurious effect or influence in determining the jury’s verdict.” Brecht v.
18 Abrahamson, 507 U.S. 619, 638 (1993). Petitioner has not pointed to any evidence that any
19 potential juror bias had any prejudicial effect on his/her verdict or ability to decide the case
20 solely on the evidence.

21 In light of the above, and after a thorough and independent review of the underlying
22 record, the court concludes that where petitioner does not allege jury tampering, did not request a
23 hearing, and through counsel, approved of the manner in which the court conducted its
24 investigation into a potential juror bias, the state court’s denial of this claim is not contrary to, or
25 an unreasonable application of, clearly established federal law.

26 3. CALJIC Nos. 1.00 and 17.41.1.

27 Petitioner claims that when the trial court instructed the jury to with CALJIC
28

No.17.41.1³, combined with CALJIC No. 1.00⁴, it gave the improper impression that the jurors had to “police” each other, erroneously prompted the jurors to use evidence outside of the record during deliberations, and wrongly represented that the jurors would be subject to sanctions. (Petition at 3-1, 3-2.)

The Ninth Circuit has held that there is no “clearly established United States Supreme Court precedent” which establishes that an anti-nullification instruction such as CALJIC No. 17.41.1 violates a constitutional right. Brewer v. Hall, 378 F.3d 952, 955-56 (9th Cir. 2004). The court therefore held that a California appellate court’s rejection of a challenge to 17.41.1 could not be contrary to, or an unreasonable application of, clearly established Supreme Court authority. Id. at 956. In light of Brewer, that the trial court gave CALJIC No. 17.41.1 cannot be the basis for federal habeas relief.

4. Accomplice instruction

Petitioner claims that the trial court violated his right to due process and a fair trial by instructing the jury that Ryan was an accomplice because that instruction in essence directed the jury to determine that petitioner, and not Ryan, was the killer. (Petition at 4-1.) The instruction at issue was based on CALJIC No. 3.16 and read: If the charged crime or any lesser included offense or any allegation was committed by anyone, the witness Ericka Ryan was an accomplice as a matter of law and her testimony is subject to the rule requiring corroboration. (RT 971.)

To obtain federal collateral relief for errors in the jury charge, a petitioner must show that the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process. See Estelle v. McGuire, 502 U.S. 62, 72 (1991). The instruction may not be judged in artificial isolation, but must be considered in the context of the instructions as a whole and the

³ CALJIC 17.41.1 provides: The integrity of a trial requires that jurors, at all times during their deliberations, conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on any other improper basis, it is the obligation of the other jurors to immediately advise the court of the situation.

⁴ CALJIC 1.00 provides: You must accept and follow the law as I state it to you, regardless of whether you agree with the law.

1 trial record. See id.

2 In reviewing a faulty instruction, the court inquires whether there is a “reasonable
3 likelihood” that the jury has applied the challenged instruction in a way that violates the
4 Constitution. Id. at 72, n.4. If an error is found, the court must also determine that the error had
5 a “substantial and injurious effect or influence in determining the jury’s verdict” before granting
6 relief in habeas proceedings. Brecht v. Abrahamson, 507 U.S. 619, 637 (1993).

7 Here, the jury was not reasonably likely to interpret the instruction in the manner that
8 petitioner claims when viewed in the context of the overall charge. See United States v.
9 Harrison, 34 F.3d 886, 889 (9th Cir. 1994). The jury was instructed that an “accomplice is a
10 person who was subject to prosecution for the same crime with which the defendant is charged
11 by reason of aiding and abetting or being a member of a criminal conspiracy,” see CALJIC 3.10;
12 that not all the instructions are applicable, depending on what facts the jury determined to be
13 true, see CALJIC 17.31 (“Disregard any instruction which applies to facts determined by you not
14 to exist. Do not conclude that because an instruction has been given I am expressing an opinion
15 as to the facts.”); and that, “if the charged crime or any lesser included offense or any allegation
16 were committed *by anyone*,” Ryan was an accomplice, and her testimony required collaboration,
17 see CALJIC 3.16 (emphasis added). See Morris v. Woodford, 273 F.3d 826, 834 (9th Cir. 2001)
18 (rejecting similar challenge to accomplice instruction). The instructions correctly stated that if
19 Ryan had “any active role in the crime-including, of course, actually killing [the victim] - [her]
20 testimony required corroboration.” Id. In light of the overall charge to the jury, there is no
21 “reasonable likelihood” that any juror would have understood the challenged instruction to
22 require the jury to find that petitioner was the killer and Ryan merely an accomplice. See
23 Estelle, 502 U.S. at 702, n.4. Therefore, there was no error, much less constitutional error. See
24 id.

25 After a thorough and independent review of the underlying record, the court concludes
26 that the state court’s rejection of petitioner’s claim that the instruction regarding corroboration
27 by an accomplice violated his right to due process was not contrary to, or an unreasonable
28 application of, Supreme Court authority, nor was it based upon an unreasonable application of

1 the facts in light of the evidence presented. 28 U.S.C. § 2254 (d)(1), (2).

2 5. Prosecutorial misconduct

3 Petitioner raises several claims that the prosecutor improperly placed the weight of the
4 government behind Ryan and against petitioner. (Petition at 5-2.) Specifically, he claims that
5 the prosecutor: (a) vouched for the credibility of Ryan; (b) questioned petitioner 18 times about
6 whether government witnesses were lying; (c) expressed his personal opinions about petitioner's
7 guilt; (d) called into question defense counsel's integrity and implied that the theory of defense
8 was a sham; and (e) argued to the jury that it was the jurors duty to find petitioner guilty.⁵
9 (Petition at 5-2.)

10 A. Vouching

11 Petitioner claims that the prosecutor intimated he could vouch for Ryan's truthful
12 testimony and assure her veracity. (Petition at 5-3 - 5-14.) Petitioner points to the prosecutor's
13 statements to the jury that Ryan's guilty plea had a factual basis, and was conditioned on her
14 testifying truthfully. (Petition at 5-5.) Petitioner also asserts that the prosecutor claimed to have
15 "extra-record" knowledge of Ryan's truthfulness and that he was monitoring her testimony for
16 such truthfulness. (Petition at 5-6, 5-8.)

17 Prosecutorial misconduct is cognizable in federal habeas corpus. The appropriate
18 standard of review is the narrow one of due process and not the broad exercise of supervisory
19 power. See Darden v. Wainwright, 477 U.S. 168, 181 (1986). A defendant's due process rights
20 are violated when a prosecutor's misconduct renders a trial "fundamentally unfair." See id.
21 Under Darden, the first issue is whether the prosecutor's remarks were improper; if so, the next
22 question is whether such conduct infected the trial with unfairness. Tan v. Runnels, 413 F.3d
23 1101, 1112 (9th Cir. 2005).

24 A prosecutor may not vouch for the credibility of a witness. United States v. Sanchez,
25 176 F.3d 1214, 1224 (9th Cir. 1999). Improper vouching for the credibility of a witness occurs
26

27 ⁵ Petitioner also claims that the prosecutor improperly used petitioner's exercise of his
28 right to an attorney and right to remain silent against him at trial. This claim is duplicated in
petitioner's petition. The court addresses this claim under Claim 7 below.

1 when the prosecutor places the prestige of the government behind the witness or suggests that
2 information not presented to the jury supports the witness' testimony. United States v. Parker,
3 241 F.3d 1114, 1119-20 (9th Cir. 2001). "To warrant habeas relief, prosecutorial vouching must
4 so infect the trial with unfairness as to make the resulting conviction a denial of due process."
5 Davis v. Woodford, 384 F.3d 628, 644 (9th Cir. 2004) (citation and internal quotation omitted).

6 Here, contrary to the petitioner's assertion, the prosecutor did not rely upon any "extra-
7 record" knowledge of Ryan's truthfulness. The prosecutor referred to Ryan's plea agreement in
8 his closing on rebuttal and orally read portions of the agreement into the record. (RT 2161-63.)
9 Further, the plea agreement had already been admitted into evidence as an exhibit without
10 objection. (RT 1199.) The prosecutor's reading of the plea agreement did not constitute
11 vouching as it was in response to defense counsel's closing argument in which he attacked
12 Ryan's credibility. See, e.g., United States v. Shaw, 829 F.2d 714, 716 (9th Cir. 1987) (noting
13 that it is "clear that references to requirements of truthfulness in plea bargains do not constitute
14 vouching when the references are responses to attacks on the witness' credibility because of his
15 plea bargain").

16 Petitioner argues that evidence of Ryan's polygraph examination, the prosecutor's
17 reference to the preliminary hearing, and Inspector Losey's testimony represented to the jury that
18 the prosecutor was monitoring Ryan's testimony for truthfulness. However, any evidence
19 regarding Ryan's polygraph examination was introduced during petitioner's testimony (RT
20 1278), the court instructed the jury to strike testimony referencing a polygraph examination (RT
21 1727), and the prosecutor neither introduced nor mentioned such an examination. Second,
22 although the prosecutor during his rebuttal closing argument mentioned a preliminary hearing as
23 being the factual basis for Ryan's plea, the court does not find it reasonable that the jury would
24 interpret that isolated statement of the preliminary hearing to mean that the prosecutor or the
25 court was monitoring Ryan's testimony. See Donnelly v. DeChristoforo, 416 U.S. 637, 647
26 (1974) (noting differences between isolated remarks and "consistent and repeated
27 misrepresentations" and suggesting that "a court should not lightly infer that a prosecutor intends
28 an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy

1 exhortation, will draw that meaning from the plethora of less damaging interpretations”).
2 Finally, Inspector Losey’s testimony that he never heard Ryan mention that she knew where the
3 victim’s body was even though she had testified that she was able to point out where the body
4 was found neither demonstrates nor implies that either he or the prosecutor were monitoring
5 Ryan’s testimony for truthfulness. Accordingly, the court rejects petitioner’s claim that the
6 prosecutor engaged in improper vouching.

7 Moreover, even assuming that the prosecutor committed error, the trial court instructed
8 the jurors several times that their decision was to be made on the basis of the evidence alone, and
9 that the arguments of counsel were not evidence. Darden, 477 U.S. at 181-82. Furthermore,
10 there is no evidence that any vouching so infected the trial with unfairness as to make the
11 resulting conviction a denial of due process. Davis, 384 F.3d at 644.

12 Therefore, after a thorough and independent review of the underlying record, the court
13 concludes that the state court’s rejection of petitioner’s claim of improper vouching was not
14 contrary to, or an unreasonable application of, Supreme Court authority, nor was it based upon
15 an unreasonable application of the facts in light of the evidence presented. 28 U.S.C. § 2254
16 (d)(1), (2).

17 B. Questioned petitioner as to which witnesses were lying

18 Petitioner claims that it was prejudicial error for the prosecutor to question him 18 times
19 as to whether petitioner believed government witnesses were lying. (Petition at 5-15 - 5-17.)

20 Improper questioning of a witness by the prosecutor is not sufficient by itself to warrant
21 reversal. United States v. Moreland, 509 F.3d 1201, 1213 (9th Cir. 2007) (quotation and citation
22 omitted). In considering whether the questioning deprived the defendant of a fair trial, the
23 witness’ testimony should be viewed as a whole to determine the impact of the improper
24 questioning. Ortiz v. Stewart, 149 F.3d 923, 934 (9th Cir. 1998). It is improper for a prosecutor
25 to question a defendant regarding the veracity of government witnesses. Moreland, 509 F.3d at
26 1212; see, e.g., United States v. Sanchez, 176 F.3d 1214, 1220-21, 1222, 1223-24 (9th Cir. 1999)
27 (improper where prosecutor elicited defendant’s testimony that Marshal was a liar).

28 Applying the highly deferential standard of the AEDPA, the court concludes that the

1 prosecutor's questioning did not result in a violation of due process. A review of the record
 2 demonstrates that during petitioner's cross-examination, he suggested that government witnesses
 3 were lying⁶, to which the prosecutor followed up by asking petitioner which witnesses in
 4 particular petitioner believed were lying⁷⁸.

5 _____
 6 ⁶ Specifically, petitioner stated, "The story you've heard by the other people is fictitious.
 7 It never happened." (RT 1469.)

8 ⁷ Q: You said Mickey [Parsons] lied the other day in his testimony?

A: Yes, sir.

9 Q: One of the lies would be, I guess, that he said there was a physical altercation
 10 that last evening when there was none?

A: Yes, sir.

11 Q: What other lies did he tell?

12 A: I would say he gave a -- his rendition sitting up here, probably high on
 13 marijuana, about a choke hold that he had no idea how it worked, talking about
 14 me squeezing when people exhale. And that has nothing to do with anything, as
 15 you've heard from Detective Thiel or -- or the coroner or the pathologist. People
 16 can breathe and still pass out.

17 Q: Sure. Can you think of any other lies that -- that Mickey told while you were
 18 sittin' down here at the end of the table and he was testifying at this trial?

A: Sir, I would have to refer to notes, like you would understand.

19 Q: Nothing stands out as -- as something you remember as, whoa, that didn't
 20 happen; he's lying about that, as you sit here now?

A: Yes, sir. Just like I was saying, many of those things did not happen.

21 Q: But you can't think of anything that Mr. Parsons testified to as you sit there
 22 right now that -- that occurred to you, that's a lie; that didn't happen?

A: The fight. That's a lie. It didn't happen.

23 Q: Okay. But nothing else?

24 (RT 1469-71.)

25 ⁸ Q: You said just a few moments ago that some witnesses are making up a story as
 26 they testify?

A: Oh, yes, sir.

27 Q: Who do you think is lying, Mr. Hall?

28 A: We just saw yesterday, Detective Losey misled you to believe that Ericka
 Ryan never told him where the body was.

Q: So, it's your testimony that Inspector Losey, this gentlemen right here, lied
 under oath yesterday?

A: During close, my attorney will go over these points and show you through
 transcripts, and time and time again, not only did she tell him, but a couple of
 pages later, on page 20 and 21, he gives her the grid coordinates on a map and
 says, "This is where we found the man, this little spot right here." Don't quote
 me exactly, but that's pretty close, sir.

1 While it can be inappropriate in certain circumstances for prosecutors to ask a defendant
 2 about the veracity of the testimony of government witnesses, here, the prosecutor's questions
 3 followed up petitioner's own assertions that the government witnesses had given "fictitious"
 4 testimony. In such a context, the prosecutor's questions did not infect "the trial with unfairness
 5 as to make the resulting conviction a denial of due process." Darden, 477 U.S. at 181 (internal
 6 quotation omitted).

7 With respect to the questioning about Parsons' lies, Moreland and Sanchez are factually
 8

9 Q: Anybody besides Inspector Losey lie?

10 A: My -- my attorney will address those problems in close.

11 Q: I'm asking you, Mr. Hall, who else?

12 A: I don't think you want to know, sir. I can't speculate right now. . . . Yes.
 Ericka Ryan has sat here and lied to you under oath time and time again. And
 what is appalling is that you can allow this to go on, sir, knowing the truth.

13 Q: Besides Ericka Ryan and Inspector Losey, anybody else.

14 A: Detective Thiel, when he was on the stand, said the word goatee. You'll see
 on my Kentucky ID that sometimes I do have a beard, much like possibly one in
 the jury. Sometimes I have none. My driver's license, or the ID, one of them I
 have no beard; one of them I have a beard. The word goatee was never
 mentioned in any statement by any witness ever. It was, I think, intentionally
 blurted out for helpful reasons to take all these smaller lies and make up a larger
 lie.

18 Q: In addition to Detective Thiel and Inspector Losey and Ericka Ryan, who else
 has been lying, Mr. Hall?

19 A: I would have to go through my notes, sir.

20 Q: Nobody comes to mind right now?

21 A: No, I'd have to speculate.

22 Q: What's your best recollection of who -- besides Inspector Losey and Detective
 Theil and Ericka Ryan, what's your best recollection of the witnesses who have
 lied during this trial?

23 A: Lie is a word that I didn't want to lower myself to. Name calling. During our
 break I was called this numerous times by the District Attorney, a liar. He's
 using, I'd like to say, obfuscation, giving facts, but misleading you to believe in a
 way that he's trying to present 'em. This is not possibly lying, is it criminal?
 This will be decided after this, I'm sure. But they are misleading facts and trying
 to, as we saw this morning, use anatomical names instead of what we were
 actually looking for. You were lulled into a trance about the prostate gland when
 we know what the actual reason was for the doctor to sit up here and be on the
 stand.

27 Q: Was the doctor lying, too?

28 A: No, sir.

(RT 1849-50.)

1 distinguishable. In those cases, the Ninth Circuit emphasized that the prosecutor cannot force a
2 defendant to give his opinion on whether government witnesses were lying. Here, the prosecutor
3 did not force petitioner to give his opinion on whether Parsons was a liar. Petitioner offered up
4 that opinion of his own volition. (RT 1469.) After petitioner stated, “The story you’ve heard by
5 the other people is fictitious,” the prosecutor merely asked petitioner to clarify that he was
6 referring to Parsons, and then asked petitioner specifically what statements he believed Parsons
7 lied about. (RT 1469-71.)

8 With respect to the remaining line of questions (RT 1849-50), the prosecutor’s questions
9 did not so infect the trial so as to make the conviction a denial of due process. As petitioner
10 notes, the case hinged on credibility. Given this, the court finds it highly unlikely that the
11 prosecutor’s questions compromised the fairness or integrity of the trial. The prosecutor’s
12 questions simply allowed petitioner to present the defense petitioner presented throughout trial:
13 that the government witnesses were not being truthful. Petitioner points to nothing to suggest
14 that the prosecutor’s accentuation of petitioner’s sole theory of defense changed the outcome of
15 the trial or otherwise compromised its integrity. Further, the jury was properly instructed that it
16 should not consider counsel’s statements as evidence.

17 In addition, the court recognizes that, on direct appeals, the Ninth Circuit has held that a
18 prosecutor should not ask a defendant “were they lying?” questions. See e.g., United States v.
19 Combs, 379 F.3d 564, 572 (9th Cir. 2004) (finding error plain and affecting substantial rights);
20 Sanchez, 176 F.3d at 1219-20 (declining to decide whether such error is plain or affected the
21 defendant’s substantial rights).⁹ Moreover, this prohibition applies in the situation where
22 defendant’s version of what happened is merely contrary to that of a government witness. Here,
23 petitioner had already accused government witnesses of lying and being deceitful. Further, a
24 state court’s decision is not necessarily contrary to, or an unreasonable application of clearly
25 established federal law merely because there is federal circuit law that applies such principles
26 differently. See Duhaime v. Ducharme, 200 F.3d 597, 602-03 (9th Cir. 2000). It should also be

27
28 ⁹ The court notes that the California Supreme Court has held that such questions may be appropriate and may not implicate a defendant’s constitutional rights. People v. Tafoya, 42 Cal. 4th 147, 176-79 (2007); People v. Chatman, 38 Cal. 4th 344, 381-84 (2006) (same).

1 noted that the Ninth Circuit cases discussing “were they lying” questions involved direct appeals
 2 of federal convictions; as such, they did not apply the deferential standard of review required by
 3 the AEDPA. In order to obtain federal habeas relief, there must be applicable “clearly
 4 established” Supreme Court precedent. See 28 U.S.C. § 2254(d)(1). Petitioner cites no clearly
 5 established Supreme Court precedent, and the court is aware of none providing that a
 6 prosecutor’s questioning a witness about the veracity of government witnesses may violate a
 7 defendant’s right to due process. Because petitioner points to no controlling Supreme Court
 8 precedent, and the court is unable to find one, see Carey v. Musladin, 127 S. Ct. 649, 653-54
 9 (2006), and, after a thorough and independent review of the underlying record, the court
 10 concludes that the state court’s decision rejecting petitioner’s claim of prosecutorial misconduct
 11 is not contrary to, or an unreasonable application of, clearly established law.

12 C. Expressed personal opinion about petitioner’s guilt

13 Petitioner claims the prosecutor wrongly expressed personal opinions about petitioner’s
 14 guilt. (Petition at 5-19, 5-20.) Specifically, petitioner cites to six examples in the prosecutor’s
 15 closing argument that he claims were improper:

- 16 (1) Let’s make no mistake about it, this man right here . . . is a
 17 murderer. (RT 2001.)
- 18 (2) I defy anyone to tell me that -- that the evidence doesn’t establish
 19 that -- that this is first degree murder . . . (RT 2027.)
- 20 (3) People had to prove, one, that a murder was committed; that the
 21 murder was committed during the robbery; and that defendant was in fact
 22 the murderer . . . And we did what we set out to do. (RT 2029.)
- 23 (4) We also know that somebody in this proceeding is not telling the
 24 truth. Now, we can understand why the defendant would lie. He doesn’t
 want to be convicted or punished for what he’s done. We can understand
 it, but we can’t condone it. (RT 2033.)
- (5) He’s a sociopath. He is a man without a conscience, without a
 moral compass to guide him. (RT 2034.)
- (6) This is a search for the truth. The truth is neutral. The truth
 doesn’t care who wins. Truth doesn’t care who loses. Sometimes truth is
 pleasant . . . Your verdict should be guilty as charged murder in the first
 degree with special circumstances. (RT 2036-37.)

25 A prosecutor may not express his personal opinion of the defendant’s guilt. See United
 26 States v. Younger, 398 F.3d 1179, 1190 (9th Cir. 2005). A prosecutor should not use the phrase
 27 “we know” in summation to discuss evidence in summation; however, it is not improper as a
 28 means of marshaling the evidence offered at trial. Id. at 1191. The prosecutor may, however,

1 make comments about the character of one who would commit the crime at issue. See, e.g.,
 2 Turner v. Marshall, 63 F.3d 807, 818 (9th Cir. 1995) (no due process violation arising from
 3 prosecutor's comments that perpetrator of crime a "monster of a human being"), overruled on
 4 other grounds by Tolbert v. Page, 182 F.3d 677, 685 (9th Cir. 1999) (en banc).

5 A review of the transcripts and the prosecutor's comments in context demonstrate that
 6 these phrases were used to "marshal evidence actually admitted at trial and reasonable inferences
 7 from that evidence, not to vouch for witness veracity or suggest that evidence not produced
 8 would support a witness's statements." Younger, 398 F.3d at 1191. As such, they were not
 9 improper and habeas relief is inappropriate. See Darden, 477 U.S. at 181.

10 Therefore, after a thorough and independent review of the underlying record, the court
 11 concludes that the state court's rejection of this claim was not contrary to, or an unreasonable
 12 application of, Supreme Court authority, nor was it based upon an unreasonable application of
 13 the facts in light of the evidence presented. 28 U.S.C. § 2254 (d)(1), (2).

14 D. Calling into question defense counsel's integrity

15 Petitioner claims that the prosecutor called into question defense counsel's integrity, in
 16 violation of petitioner's right to due process. Petitioner argues that the prosecutor should not
 17 have (1) told the jury that it was counsel's job to "get petitioner off" and (2) implied to the jurors
 18 that counsel engaged in the production of perjury by using the discovery received from the
 19 government to make up petitioner's testimony along the way. (Petition at 5-28.)

20 Specifically, petitioner complains about this portion of the prosecutor's comments:

21 It is fair during this portion of the trial for the attorneys to comment on
 22 both the law and the evidence. And that's because we have differing
 23 roles in this proceeding. An attorney is an advocate. He is a proponent
 24 of one side or the other. He is trying to persuade you that both the law
 25 and the evidence support his particular position. Keep that in mind. It is
 26 my job, if I can, to convince you that the evidence establishes beyond a
 27 reasonable doubt that the charge against the defendant is true. And it's
 28 Mr. Eannarino's job, if he can, to get his client off. So, as you listen to
 us, as you listen to the argument, understand we are not neutral; we are
 trying to convince, trying to persuade.

(RT 2003.)

While petitioner is correct that a prosecutor engages in misconduct if he calls the defense
 a sham, see United States v. Sanchez, 176 F.3d 1214, 1224 (9th Cir. 1999), a review of the trial

1 transcript here reveals that the prosecutor's remarks in context neither attacked counsel's
2 integrity nor remarked that the defense was a sham. (RT 2003, 2172.) The court finds that the
3 prosecutor's brief remarks did not so infect the trial with unfairness. See Darden, 477 U.S. at
4 181.

5 Accordingly, after a thorough and independent review of the underlying record, the court
6 concludes that the state court's rejection of this claim was not contrary to, or an unreasonable
7 application of, Supreme Court authority, nor was it based upon an unreasonable application of
8 the facts in light of the evidence presented. 28 U.S.C. § 2254 (d)(1), (2).

9 E. Argument that jurors had to find petitioner guilty

10 Petitioner claims the prosecutor committed prejudicial misconduct when he told the jury
11 it was their duty to find him guilty (Petition at 5-30), and inflamed the passions and prejudices of
12 the jury by commenting on Schauer's "bereaved family," (Petition at 5-31).

13 An appeal to the jury to act as the conscience of the community is not impermissible
14 unless it is specifically designed to inflame the jury. United States v. Lester, 749 F.2d 1288,
15 1301 (9th Cir. 1984). Any error is not reversible, however, if the judge gives a curative
16 instruction that counsel's arguments are not evidence and that the jury's only job is to determine
17 guilt or innocence from the evidence in the case. See United States v. Polizzi, 801 F.2d 1543,
18 1558 (9th Cir. 1986).

19 Here, there is no evidence that the prosecutor's brief mention of the testimony of the
20 victim's wife was "specifically designed to inflame the jury." (RT 2030)¹⁰. Further, a review of
21 the closing argument statements in context demonstrates that the prosecutor did not, in fact, tell
22 the jury it was their "duty" to convict petitioner. The prosecutor reminded the jury that it was
23 their duty to find the facts and use the law as given to them to determine their verdict. (RT
24 2187.) Nevertheless, even assuming any comment was improper, the judge gave appropriate
25 curative instructions that counsel's arguments were not evidence and the jury should decide the
26

27 ¹⁰ "And [petitioner's] testimony in this case makes superfluous the testimony of many of
28 the witnesses who were called during the People's case in chief. He does not now dispute that
David Schauer was a human being. So Kathy Howell's identification of David, of David as her
friend and the father of her two children, is no longer at issue, not being contested." (RT 2030.)

1 case only based on the evidence presented to it. (RT 1955-56.) Accordingly, the court finds that
2 the prosecutor's brief remarks did not so infect the trial with unfairness.

3 After a thorough and independent review of the underlying record, the court concludes
4 that the state court's rejection of this claim was not contrary to, or an unreasonable application
5 of, Supreme Court authority, nor was it based upon an unreasonable application of the facts in
6 light of the evidence presented. 28 U.S.C. § 2254 (d)(1), (2).

7 6. Ineffective Assistance of Appellate Counsel

8 Petitioner contends that his appellate counsel rendered ineffective assistance by failing to
9 raise the above five issues in his direct appeal. (Petition at 6-1.)

10 Claims of ineffective assistance of appellate counsel are reviewed according to the
11 standard set out in Strickland v. Washington, 466 U.S. 668 (1984). See Miller v. Keeney, 882
12 F.2d 1428, 1433 (9th Cir. 1989). A defendant therefore must show that counsel's representation
13 did not meet an objective standard of reasonableness and that there is a reasonable probability
14 that, but for counsel's unprofessional errors, he would have prevailed on appeal. See id. at 1434
15 & n.9 (citing Strickland, 466 U.S. at 688, 694).

16 It is important to note that appellate counsel does not have a constitutional duty to raise
17 every nonfrivolous issue requested by defendant. See Jones v. Barnes, 463 U.S. 745, 751-54
18 (1983). The weeding out of weaker issues is widely recognized as one of the hallmarks of
19 effective appellate advocacy. See Miller, 882 F.2d at 1434. Appellate counsel therefore will
20 frequently remain above an objective standard of competence and have caused his client no
21 prejudice for the same reason - because he declined to raise a weak issue. Id.

22 Petitioner's claim is without merit. As discussed above, there is no merit to the first five
23 claims petitioner raised in his § 2254 petition. Because those claims were meritless, appellate
24 counsel's failure to raise the issues on appeal could not have resulted in prejudice to petitioner.
25 Furthermore, because the underlying claims are without merit, their weeding out by appellate
26 counsel may constitute an instance of effective advocacy, as defined in Miller.

27 After a thorough and independent review of the underlying record, the court concludes
28 that the state court's rejection of petitioner's claim of ineffective assistance of appellate counsel

1 was not contrary to, or an unreasonable application of, Supreme Court authority, nor was it based
 2 upon an unreasonable application of the facts in light of the evidence presented. 28 U.S.C.
 3 § 2254 (d)(1), (2).

4 7. Doyle claim

5 Petitioner claims that the prosecutor violated his right to due process by asking a question
 6 on cross-examination and by making a comment in closing argument about petitioner's post-
 7 Miranda silence, in violation of Doyle v. Ohio, 426 U.S. 610 (1976). (Petition at 9-1 - 9-5.) The
 8 prosecutor argued that he was entitled to put on rebuttal evidence during cross-examination in
 9 order to show that petitioner had stopped speaking to the police because he had requested an
 10 attorney, and to refute the impression from petitioner's testimony that he had stopped talking to
 11 the police because the police believed he had no further information about the crimes.¹¹ (Petition
 12 at 9-2.) The prosecutor further commented on petitioner's invocation of his right to counsel in
 13 closing argument stating, "the conversation ended when he asked to speak with an attorney."
 14 (Petition at 9-3.)

15 The state appellate court denied this claim both on procedural and substantive grounds.
 16 First, it concluded that petitioner waived this claim by failing to object to it at trial. (Resp. Ex. I,
 17 p. 20-21.) Although counsel initially objected to the prosecutor's questioning, counsel objected
 18 on the basis of relevance and not on any constitutional ground. (Id.) Alternatively, the court
 19 also concluded that, nevertheless, the admission of petitioner's invocation of counsel was
 20 harmless. (Id. at 21-23.)

21 In cases in which a state prisoner has defaulted his federal claims in state court pursuant
 22 to an independent and adequate state procedural rule, federal habeas review of the claims is

23 ¹¹ Q: -- you told them that whatever Ericka said was what happened, didn't you?

24 A: Yes, sir. Before they had talked to me, again, Ericka Ryan had left the interview room
 25 crying, and I had seen that. When they then asked me to talk to 'em, I went in and said,
 26 whatever Ericka Ryan says is what happened.

27 Q: And you said that more than once, didn't you?

28 A: I might have said it twice.

Q: And then you told them that you wanted an attorney?

A: Yes. I -- I think I said I do not want to talk anymore.

1 barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result
2 of the alleged violation of federal law, or demonstrate that failure to consider the claims will
3 result in a fundamental miscarriage of justice. See Coleman v. Thompson, 501 U.S. 722, 750
4 (1991). The Ninth Circuit has recognized and applied the California contemporaneous objection
5 rule in affirming the denial of a federal petition on grounds of procedural default where there
6 was a complete failure to object at trial, see Inthavong v. Lamarque, 420 F.3d 1055, 1058 (9th
7 Cir. 2005), and also where, as here, the petitioner raised only an evidentiary, not a constitutional
8 objection, at trial, see Davis v. Woodford, 384 F.3d 628, 653-54 (9th Cir. 2004).

9 Having determined that California's contemporaneous objection rule is an independent
10 and adequate procedural bar, the court turns to whether petitioner demonstrates cause and
11 prejudice for the default. See Coleman, 501 U.S. at 750. Here, petitioner's only reason for
12 failing to timely object was based on an allegation that counsel was ineffective. (Petition at 9-4.)
13 However, counsel's mere failure to recognize the factual or legal basis for a claim, or failure to
14 raise the claim despite recognizing it, does not constitute cause. See Murray v. Carrier, 477 U.S.
15 478, 486 (1986). To serve as "cause," the claim of ineffective assistance of counsel must have
16 been presented as an independent claim to the state courts. See id. at 489. A procedurally
17 defaulted ineffective assistance of counsel claim is not cause to excuse the default of another
18 habeas claim unless the petitioner can satisfy the cause and prejudice standard with respect to the
19 ineffective assistance of counsel claim itself. See Edwards v. Carpenter, 529 U.S. 446, 451
20 (2000). Here, petitioner not only failed to raise ineffective assistance of counsel as an
21 independent claim to the state courts, but he also failed to demonstrate cause and prejudice for
22 neglecting to raise such ineffective assistance of counsel claim. See id.

23 Alternatively, even assuming petitioner's claim is not procedurally barred, the court
24 concludes that there was no Doyle error, and accordingly, the state court's decision is not
25 contrary to or an unreasonable application of Supreme Court law.

26 The government may not use a defendant's silence "at the time of arrest and after
27 receiving Miranda warnings" to impeach the defendant's exculpatory testimony at trial. Doyle
28 v. Ohio, 426 U.S. 610, 619 (1976). Overbroad questioning and closing argument that encompass

1 post-Miranda silence violate Doyle. See United States v. Lopez, 500 F.3d 840, 844 (9th Cir.
2 2007) (Doyle error occurred when prosecutor asked defendant whether he ever mentioned his
3 excuse to a border patrol agent because defendant had been processed and given Miranda rights
4 by that agent; the questioning (as well as related closing argument) covered permissible and
5 impermissible periods).

6 Here, the admission of petitioner's response to the prosecutor's question and the
7 prosecutor's comment regarding petitioner's request for counsel did not violate petitioner's Fifth
8 Amendment rights because the prosecutor's question was a "fair response" to petitioner's
9 testimony. On direct, the petitioner's testimony gave the impression that the police stopped
10 asking questions because petitioner did not want to implicate Ryan and that the police should
11 question Ryan on the specific details of the crime. On cross-examination, the prosecutor did not
12 treat petitioner's silence as evidence of substantive guilt, but instead elicited testimony from
13 petitioner that petitioner invoked his right to counsel and to remain silent in order to explain to
14 the jury why petitioner did not answer any more questions. See United States v. Robinson, 485
15 U.S. 25, 32 (1987) ("Where the prosecutor on his own initiative asks the jury to draw an adverse
16 inference from a defendant's silence, . . . the privilege against compulsory self-incrimination is
17 violated. But where as in this case the prosecutor's reference to the defendant's opportunity to
18 testify is a fair response to a claim made by defendant or his counsel, we think there is no
19 violation of the privilege."); United States v. Scholl, 166 F.3d 964, 976 (9th Cir. 1999)
20 (questions regarding why the defendant did not provide information to the government were not
21 misconduct running afoul of Doyle v. Ohio, 426 U.S. 610 (1976), because the defendant claimed
22 that he was never given the opportunity to present documents or cooperate as he had requested).

23 Furthermore, even assuming error, the state appellate court found the following:

24 In any event we are satisfied that introduction of defendant's request
25 for counsel was harmless beyond a reasonable doubt. The only prejudicial
26 tendency of the evidence was to suggest consciousness of guilt. But the jury
27 was virtually certain to draw such an inference anyway from numerous other
28 matters in evidence. The first and most dramatic of these was defendant's
attempted suicide the day before the interview. Defendant sought to
minimize the seriousness of this attempt on the witness stand, but he
affirmatively testified that he had thoughts of suicide both before and after
his arrest. The jury was unlikely to find his explanation for these thoughts to
be nearly as persuasive as the premise that he was guilty of killing Schauer.

1 The jury was also likely to infer consciousness of guilt from the
 2 admittedly false statements defendant made to officers and the implausibility
 3 of his explanation for his failure to tell them that Ryan was the killer.
 4 Defendant claimed that he trusted Ms. Ryan to confess, as she had repeatedly
 5 promised to do in the event of apprehension. But defendant's mere belief
 6 that she would confess hardly furnished a plausible reason for him to tell
 7 police affirmatively, as he did, that Ryan "never done anything, but just be
 8 there for me," And "Erica's done nothin['], but stay by my side . . ."
 9 Defendant's version of events conspicuously lacked an affirmative motive
 10 for him to mislead police -- thereby exposing himself to possibly severe
 11 consequences -- when he could have simply corroborated what he believed
 12 Ryan was already telling them, i.e., that she had killed the man they were
 13 asking about. No such motive appears on this record. Defendant suggested
 14 in cross-examination that he was "being evasive" with the officers because
 15 he "didn't want to tell on" Ryan, but he claimed no feelings which might
 16 explain this preference. On the contrary, eh testified that he had "no strong
 17 emotional ties" to her. Nor would there be any apparent point in lying to
 18 protect her if in fact she was in the process of confessing. Defendant's
 19 explanation for the inconsistencies between his statements to the officers and
 20 his testimony at trial makes so little sense that the jurors were highly unlikely
 21 to credit it under any circumstances. And if the jury rejected defendant's
 22 explanation of his supposed lies to the officers, they were left with only one
 23 other explanation: he was lying at trial when he painted Ryan as the killer.

24 We are satisfied beyond a reasonable doubt that the jury would not
 25 have accepted defendant's version of events, but would instead have found
 26 defendant guilty beyond a reasonable doubt, whether or not it learned that
 27 defendant terminated the August 30 interrogation by invoking his right to
 28 counsel.

(Resp. Ex. I, p. 21-23.)

 The prosecution mentioned petitioner's invocation of the right to counsel once during
 questioning, and once during closing argument. (RT 1534, 2032.) Based on the persuasive
 reasoning of the state court, this court cannot conclude that any error had a "substantial and
 injurious effect" on the jury's verdict. See Brecht v. Abrahamson, 507 U.S. 619, 637 (1993)
 (internal quotation marks and citation omitted).

 Accordingly, the court concludes that the state appellate court's decision was not
 contrary to, or an unreasonable application of clearly established federal law, nor was it an
 unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. §
 2254(d)(1), (2).

8. Impeachment using custodial statements

 Petitioner alleges that his statements to the police were involuntary and in violation of
Miranda, as found by the trial court, and therefore, the prosecution should not have been

1 permitted to use those statements against him on cross-examination or for any purpose. (Petition
2 at 10-1 - 10-6.)

3 At trial, the court held a suppression hearing to determine whether statements petitioner
4 made while in custody were taken in violation of Miranda. The trial court granted petitioner's
5 motion to suppress on the ground that he had not waived his Miranda rights. The court further
6 stated that in the event petitioner testified, portions of his statements could come in. However,
7 the court did not explicitly rule on whether or not petitioner's statements were voluntarily made.
8 At trial, petitioner testified about the circumstances surrounding his custodial interrogation,
9 including his own version of what happened at the interrogation. At the conclusion of his
10 testimony, the prosecution indicated that it wished to play the tape of petitioner's interview in
11 light of petitioner's "opening the door" to those circumstances. Counsel for defendant conceded
12 that he did open the door to that line of questioning and that it was intentional. Both parties
13 stipulated to admitting the recording of the interview as well as a copy of the transcript.

14 Involuntary confessions in state criminal cases are inadmissible under the Fourteenth
15 Amendment. Blackburn v. Alabama, 361 U.S. 199, 207 (1960); Henry v. Kernan, 197 F.3d
16 1021, 1028 (9th Cir. 1999) (noting that involuntary confessions are inadmissible for
17 impeachment). Voluntary statements taken in violation of Miranda, on the other hand, may be
18 used to impeach the defendant's credibility even though they are inadmissible as evidence of
19 guilt and are limited to collateral matters. See Harris v. New York, 401 U.S. 222, 225 (1971).
20 The voluntariness of a confession is evaluated by reviewing both the police conduct in extracting
21 the statements and the effect of that conduct on the suspect. Miller v. Fenton, 474 U.S. 104, 116
22 (1985). Absent police misconduct causally related to the confession, there is no basis for
23 concluding that a confession was involuntary in violation of the Fourteenth Amendment.
24 Colorado v. Connelly, 479 U.S. 157, 167 (1986).

25 To determine the voluntariness of a confession, the court must consider the effect that the
26 totality of the circumstances had upon the will of the defendant. Schneckloth v. Bustamonte,
27 412 U.S. 218, 226-27 (1973). "The test is whether, considering the totality of the circumstances,
28 the government obtained the statement by physical or psychological coercion or by improper

1 inducement so that the suspect's will was overborne." United States v. Leon Guerrero, 847 F.2d
2 1363, 1366 (9th Cir. 1988). The assessment of the totality of the circumstances may include
3 consideration of the length and location of the interrogation; evaluation of the maturity,
4 education, physical and mental condition of the defendant; and determination of whether the
5 defendant was properly advised of his Miranda rights. Withrow v. Williams, 507 U.S. 680, 693-
6 94 (1993).

7 The state appellate court rejected this claim and concluded that petitioner's statements
8 were voluntary, and therefore, admissible for impeachment purposes. (Resp. Ex. I., p. 14-18.)
9 The state court relied on factors such as petitioner's maturity, his good physical condition; the
10 absence of any medical or drug-related impairment; the relative brevity of the questioning; and
11 the fact that the statements were made after a proper Miranda warning which petitioner said he
12 understood. (Id. at 14.)

13 A review of the interview and the record in this case demonstrates that petitioner's
14 statements were voluntarily given. Although petitioner compares his situation to those facts
15 given in Henry v. Kernan, 197 F.3d 1021 (9th Cir. 1999), the record belies his assertions. In
16 Henry, even after the petitioner repeatedly asked for counsel, the police continued to ask
17 questions in order to elicit responses. Further, in Henry, the transcript "reveal[ed] a confused
18 and frightened defendant who garbled his sentences, was frequently inaudible, and was often
19 entirely incoherent for long passages." Id. at 1027, fn.3. By the end of the interview, the
20 defendant was sobbing, and throughout the interview, the defendant was confused, shaken,
21 frightened, and crying. Id.

22 In contrast here, although petitioner did not waive his Miranda rights after he was
23 advised of them, the police ceased questioning the moment petitioner requested counsel.
24 Further, contrary to petitioner's assertions, he never stated he did not wish to answer any more
25 questions. See Amaya-Ruiz v. Stewart, 121 F.3d 486, 494 (9th Cir. 1997) (noting that
26 encouraging a suspect to tell the truth does not amount to coercion). In addition, petitioner's
27 interrogation lasted less than one hour, his statements did not confess any involvement with the
28 crime, and his apparent confusion or tiredness did not appear to be suggestive of a vulnerability

1 to coercion. See Cunningham v. Perez, 345 F.3d 802, 810-11 (9th Cir. 2003). Accordingly, a
2 review of the totality of the circumstances reveals that petitioner's statements were not obtained
3 through improper coercion so that his will was overborne. See Schneckloth, 412 U.S. at 226-27.

4 The court concludes that the state court's decision rejecting this claim was not contrary
5 to, or an unreasonable application of clearly established federal law, nor was it an unreasonable
6 determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d)(1), (2).

7 9. Confrontation Clause

8 Petitioner claims that the trial court's prohibition of Ryan's cross-examination in four
9 separate areas violated his right to confrontation and the compulsory process. (Petition at 11-1 -
10 11-3.) Specifically, he alleges that the trial court should have allowed him to question Ryan
11 regarding: (1) whether her husband had a basis for his fears regarding her marital fidelity; (2) her
12 abuse of drugs prior to March 1999; (3) the details she gave to police on a crime scene visit; and
13 (4) whether petitioner "rolled his eyes" when she asked him to choke someone. Petition at 11-1.
14 In addition, petitioner claims that the court quashed his subpoena to access Ryan's psychiatric
15 records, in violation of the Confrontation Clause and compulsory process. (Petition at 11-1.) As
16 a result, petitioner asserts that these prohibitions stifled his ability to produce a different
17 impression of Ryan's credibility. (Petition at 11-3.)

18 The Confrontation Clause does not prevent a trial judge from imposing reasonable limits
19 on cross-examination based on concerns of harassment, prejudice, confusion of issues, witness
20 safety or interrogation that is repetitive or only marginally relevant. Delaware v. Van Arsdall,
21 475 U.S. 673, 679 (1986). The Confrontation Clause guarantees an opportunity for effective
22 cross examination, not cross examination that is effective in whatever way, and to whatever
23 extent, the defense might wish. See Delaware v. Fensterer, 474 U.S. 15, 20 (1985) (per curiam).
24 A defendant meets his burden of showing a Confrontation Clause violation by showing that "[a]
25 reasonable jury might have received a significantly different impression of [a witness']
26 credibility . . . had counsel been permitted to pursue his proposed line of cross-examination."
27 Van Arsdall, 475 U.S. at 680. The focus of this inquiry "must be on the particular witness, not
28 on the outcome of the entire trial." Id.

1 The state appellate court rejected this claim. As to the limitations on cross-examination,
2 the state appellate court noted that petitioner made no substantive arguments supporting his
3 claims. Nevertheless, the appellate court concluded that, with respect to the question regarding
4 fidelity, the trial court properly sustained an objection based on relevancy and California
5 Evidence Code § 352. (Resp. Ex. I, p. 23.) As to the question regarding Ryan's drug abuse prior
6 to 1999, the state appellate court noted that, based on relevancy grounds (RT 794), the trial court
7 properly limited questioning regarding drug abuse to Ryan's time with petitioner. (Resp. Ex. I,
8 p. 24.) As to the last two questions, the appellate court concluded that petitioner proffered no
9 argument as to why those questions should have been allowed over sustained hearsay objections.
10 (Id.)

11 While it is true that "evidentiary privileges or other state laws must yield if necessary to
12 ensure the level of cross examination demanded by the Sixth Amendment," Murdoch v. Castro,
13 365 F.3d 699, 702-03 (9th Cir. 2004), petitioner fails to demonstrate how any of the four barred
14 areas of cross-examination would have exposed the jury to facts upon which the jury could have
15 drawn appropriate inferences regarding Ryan. See Van Arsdall, 475 U.S. at 680; see also Jones
16 v. Gomez, 66 F.3d 199, 204-05 (9th Cir. 1995) (stating that conclusory allegations are not
17 sufficient to support habeas relief).

18 A review of the record demonstrates that, with respect to the question of fidelity, Ryan
19 did answer defense counsel's question in the affirmative that she had had an extramarital affair at
20 the time her husband was concerned about her infidelity. (RT 790.) With respect to Ryan's drug
21 abuse, although the trial court prohibited questions regarding her drug use prior to March 1999,
22 defense counsel was allowed to explore her drug abuse involving crack and alcohol beginning
23 from March 1999 and beyond. (RT 794-99.) Petitioner fails to explain what about Ryan's drug
24 use prior to March 1999 would have changed the jury's outlook. With respect to Ryan's
25 statements to the police during a visit to the crime scene, defense counsel had asked Ryan to
26 detail what she told police that day, upon which the trial court sustained a hearsay objection.
27 (RT 814.) Thereafter, defense counsel ceased his questioning regarding the visit to the crime
28 scene. (RT 814-15.) It appears from the record that the trial court did not prohibit any

1 discussion regarding what counsel could ask about the visit to the crime scene; it merely
2 prohibited the form of that particular question. (RT 814.) Finally, with respect to the comment
3 regarding choking, the record shows that although Ryan was not permitted to answer the
4 question presented based on a sustained hearsay objection, defense counsel had already made his
5 point of refuting Ryan's assertions that petitioner was the one "in charge," and that she was
6 merely a follower. (RT 833-35.) Accordingly, the cited limitations on cross-examination did
7 not prevent the jury from making reasonable inferences from the evidence to the extent the
8 evidence was relevant.

9 With respect to petitioner's claim that the court quashing of the production of Ryan's
10 psychiatric records, it appears that petitioner is referring to the records of defense consultant
11 Berg.¹² Specifically, petitioner argues that the trial court should have examined Ryan's
12 psychiatric records in chambers and subsequently disclosed to the defense any information that
13 bore on Ryan's credibility. (Petition at 11-2, 11-3.)

14 The Compulsory Process Clause of the Sixth Amendment preserves the right of a
15 defendant in a criminal trial to have compulsory process for obtaining a favorable witness. The
16 right to compulsory process is not absolute, however. See Taylor v. Illinois, 484 U.S. 400, 410
17 (1988). The Sixth Amendment right to present relevant testimony may, in appropriate cases,
18 bow to accommodate other legitimate interests in the criminal trial process. See Rock v.
19 Arkansas, 483 U.S. 44, 56 (1987). The Clause, for example, applies only to testimony that is
20 both material and favorable to the defense. See United States v. Valenzuela-Bernal, 458 U.S.
21 858, 867, 873 (1982).¹³ The accused's compulsory process rights also may be limited by
22 evidentiary rules, see Perry v. Rushen, 713 F.2d 1447, 1453-54 (9th Cir. 1983) (no violation of
23

24 ¹² The court notes that two of the three packets of Ryan's medical/psychiatric records
25 which were produced were indeed reviewed in camera by the trial court and deemed immaterial
26 for purposes of implicating Ryan's credibility or involvement in prostitution. (Resp. Ex. I, p.
27 25.)

28 ¹³ The Due Process Clause also does not guarantee the right to introduce all relevant
evidence to present a defense. See Montana v. Egelhoff, 518 U.S. 37, 42 (1996). A defendant
does not have an unfettered right to offer evidence that is incompetent, privileged or otherwise
inadmissible under standard rules of evidence. See id.

1 compulsory process to prohibit evidence of third party identity because evidence collateral and
2 state interest in evidentiary rule overriding).

3 The state appellate court rejected petitioner's confrontation and compulsory process
4 claims with regard to the medical records. It agreed with the trial court's assessment that
5 consultant Berg's records fell under both the attorney-client privilege and psychotherapist-
6 patient privilege; that the defense made no showing of materiality; and there was no
7 demonstration of a compelling showing of need to overcome the privilege. (Resp. Ex. I, p. 26-
8 27.)

9 A review of the record demonstrates that petitioner failed to demonstrate that the
10 requested records were material or favorable to the defense. In Pennsylvania v. Ritchie, 480
11 U.S. 39 (1987), upon which petitioner relies, the Supreme Court determined that, under a due
12 process analysis, disclosure of Children and Youth Services ("CYS") records in a child abuse
13 case was limited. See id. at 57-58. The Supreme Court remanded to the trial court to review
14 those records in camera. Id. at 58. It also noted, however, that the defendant "may not require
15 the trial court to search through the CYS file without first establishing a basis for his claim that it
16 contains material evidence." Id. at 58, n.15 (citing United States v. Valenzuela-Bernal, 458 U.S.
17 858, 867 (1982) ("He must at least make some plausible showing of how their testimony would
18 have been both material and favorable to his defense.")).

19 Here, petitioner failed to show that the records contained information that was material to
20 his case. See United States v. Bagley, 473 U.S. 667, 682 (1985). Petitioner requested
21 production of psychiatric records on the basis that they "might contain unspecified information
22 bearing on Ryan's credibility as a witness or might contain some evidence of her engaging in
23 prostitution." Because petitioner's proffer was insufficient to demonstrate that the information
24 he sought was material, see id., he is not entitled to habeas relief on this issue.

25 Furthermore, Ritchie expressed no opinion on whether an in camera review would be
26 warranted if the information sought was protected by an absolute state privilege. See Ritchie,
27 480 U.S. at 57 and n.14; see also People v. Gurule, 28 Cal. 4th 557, 594 (2002) ("We have held
28 that a criminal defendant's right to due process does not entitle him to invade the attorney-client

1 privilege of another.”). As the Supreme Court has not clearly established such a ruling on this
2 issue, the state court’s decision necessarily cannot be contrary to or an unreasonable application
3 of federal law. See 28 U.S.C. § 2254(d).

4 Accordingly, the court concludes that the state appellate court’s decision regarding an
5 alleged violation of confrontation and the compulsory process was not contrary to, or an
6 unreasonable application of clearly established federal law, nor was it an unreasonable
7 determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d)(1), (2).

8 10. “Other crimes” evidence

9 Petitioner claims that, over objection, and in violation of his due process rights, the trial
10 court allowed the prosecution to introduce evidence that (1) petitioner left Kentucky for
11 California in order to avoid the outstanding warrants for his arrest for being in arrears in child
12 support payments, and (2) Ryan’s statement that petitioner planned to kidnap her San Francisco
13 employer, Ms. Norris. (Petition at 12-1.)

14 A state court’s evidentiary ruling is not subject to federal habeas review unless the ruling
15 violates federal law, either by infringing upon a specific federal constitutional or statutory
16 provision or by depriving the defendant of the fundamentally fair trial guaranteed by due
17 process. See Pulley v. Harris, 465 U.S. 37, 41 (1984). Failure to comply with state rules of
18 evidence is neither a necessary nor a sufficient basis for granting federal habeas relief on due
19 process grounds. See Henry v. Kernan, 197 F.3d 1021, 1031 (9th Cir. 1999). The due process
20 inquiry in federal habeas review is whether the admission of evidence was arbitrary or so
21 prejudicial that it rendered the trial fundamentally unfair. See Walters v. Maass, 45 F.3d 1355,
22 1357 (9th Cir. 1995). But note that only if there are no permissible inferences that the jury may
23 draw from the evidence can its admission violate due process. See Jammal v. Van de Kamp, 926
24 F.2d 918, 920 (9th Cir. 1991).

25 The state appellate court rejected petitioner’s claim on appeal. It stated that although the
26 trial court granted a defense motion in limine to exclude evidence of the outstanding Kentucky
27 warrant for nonpayment of child support, several witnesses, including petitioner himself, alluded
28 to and mentioned the warrant in testimony, without objection from counsel. (Resp. Ex. I, p. 28-

29.) Without objection, stated the state court, such claim was not properly before the court on review. (Resp. Ex. I, p. 29.) With respect to testimony regarding petitioner's plan to kill Ryan's employer, the state court rejected the claim because petitioner failed to point to any specific instance or court ruling excluding such evidence. (Resp. Ex. I, p. 29-30.)

Although prior bad acts evidence cannot be used to demonstrate a criminal predisposition, such evidence is admissible for purposes of proving other relevant facts, including motive, identity, knowledge, opportunity, intent, and lack of accident or mistake. See, e.g., United States v. Hadley, 918 F.2d 848 (9th Cir. 1990) (approving use of evidence that the defendant performed similar acts of sexual gratification on previous victims). Moreover, a defendant cannot complain about the admission of bad acts evidence when he himself opens the door, either by introducing the subject or by advancing a theory that makes his prior acts relevant on an issue other than criminal propensity. See, e.g., United States v. Sarault, 840 F.2d 1479, 1485-86 (9th Cir. 1988) (holding other crimes evidence admissible, even in the prosecution's case-in-chief, when relevant to refute a defense that the accused clearly intends to advance); United States v. Bailleaux, 685 F.2d 1105, 1110 (9th Cir. 1982) (permitting the government to inquire into the facts underlying a prior conviction where the defendant first testified about the crime on direct examination). Here, because petitioner failed to object to the testimony and "opened the door" to testimony regarding the child support payments, he is not entitled to habeas relief.

With respect to the admission of petitioner's planned robbery, petitioner's petition expounds no more substance than in his state pleadings. Without specificity or substantive argument, petitioner cannot be entitled to habeas relief. See Jones v. Gomez, 66 F.3d 199, 204-05 (9th Cir. 1995) (stating that conclusory allegations are not sufficient to support habeas relief).

Moreover, the Supreme Court has expressly left open the question of whether introduction of other crimes evidence for the purpose of demonstrating propensity would offend due process principles. See Alberni v. McDaniel, 458 F.3d 860, 862-64 (9th Cir. 2006).

Accordingly, the court concludes that the state appellate court's decision was not contrary to, or

1 an unreasonable application of clearly established federal law, nor was it an unreasonable
2 determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d)(1), (2).

3 11. Exclusion of polygraph test results

4 Petitioner complains that the trial court's exclusion of polygraph test results violated his
5 due process and deprived him of a meaningful opportunity to present a complete defense.
6 (Petition at 13-1 - 13-3.) Specifically, he states that prior to trial, Ryan failed a polygraph test
7 given to her by the police. During petitioner's direct testimony, he mentioned the failed
8 polygraph test and the government did not object. A few weeks later, the government requested
9 the trial court to instruct the jury not to take any reference to polygraph tests into consideration,
10 and the court complied.

11 "State and federal rulemakers have broad latitude under the Constitution to establish rules
12 excluding evidence from criminal trials." Holmes v. South Carolina, 547 U.S. 319, 324 (2006)
13 (quotations and citations omitted). This latitude is limited, however, by a defendant's
14 constitutional rights to due process and to present a defense, rights originating in the Sixth and
15 Fourteenth Amendments. See id. "While the Constitution prohibits the exclusion of defense
16 evidence under rules that serve no legitimate purpose or that are disproportionate to the ends that
17 they are asserted to promote, well-established rules of evidence permit trial judges to exclude
18 evidence if its probative value is outweighed by certain other factors such as unfair prejudice,
19 confusion of the issues, or potential to mislead the jury." Id. at 325-26. The defendant, not the
20 state, bears the burden of demonstrating that the principle violated by the evidentiary rule "is so
21 rooted in the traditions and conscience of our people as to be ranked as fundamental." Egelhoff,
22 518 U.S. at 47 (internal quotations and citations omitted).

23 The state appellate court rejected petitioner's claim on state evidentiary grounds and did
24 not analyze it for any potential federal or constitutional violation. (Resp. Ex. I, p. 30-31.)
25 Nevertheless, this court concludes that the state court's decision rejecting petitioner's claim is
26 not contrary to or an unreasonable application of clearly established federal law. See United
27 States v. Scheffer, 523 U.S. 303 (1998) (holding that a per se rule against the admission of
28 polygraph evidence does not violate a defendant's right to present a defense under the Fifth or

1 Sixth Amendments).

2 12. Accessory after the fact instruction

3 Petitioner alleges that the trial court violated his right to due process by disallowing a
4 jury instruction which would have instructed the jury on his theory of defense. (Petition at 14-1.)
5 Specifically, petitioner states that he requested a modified version¹⁴ of CALJIC 6.40, the
6 instruction on accessories to a felony.

7 A state trial court's refusal to give an instruction must so infect the trial that the
8 defendant was deprived of the fair trial guaranteed by the Fourteenth Amendment. See
9 Dunckhurst v. Deeds, 859 F.2d 110, 114 (9th Cir. 1988). Failure to instruct on the theory of
10 defense violates due process if "the theory is legally sound and evidence in the case makes it
11 applicable." Clark v. Brown, 450 F.3d 898, 904-05 (9th Cir. 2006) (internal quotation omitted).
12 However, the defendant is not entitled to have jury instructions raised in his or her precise terms
13 where the given instructions adequately embody the defense theory. See United States v. Del
14 Muro, 87 F.3d 1078, 1081 (9th Cir. 1996).

15 Furthermore, the omission of an instruction is less likely to be prejudicial than a
16 misstatement of the law. See Walker v. Endell, 850 F.2d 470, 475-76 (9th Cir. 1987). Thus, a
17 habeas petitioner whose claim involves a failure to give a particular instruction bears an
18 "especially heavy burden." Villafuerte v. Stewart, 111 F.3d 616, 624 (9th Cir. 1997) (quoting
19 Henderson v. Kibbe, 431 U.S. 145, 155 (1977)).

20
21 ¹⁴ The proposed instruction read:

22 A person who, after a felony had been committed, harbors, conceals, or aids a principal in
23 the felony with the specific intent that the principal may avoid or escape from arrest, trial,
24 conviction, or punishment, having knowledge that the principal has committed that
25 felony or has been charged with that felony or convicted thereof, is guilty of the crime of
26 accessory to a felony in violation of Penal Code section 32. However, that person [is] not
27 guilty of murder in any degree, nor is that person guilty of either voluntary or involuntary
28 manslaughter.

29 You have not been given a verdict form for Accessory After the Fact and you are not to
30 deliberate about or speculate as to why or why not you have not been given a verdict
31 form on this issue.

(Resp. Ex. A, p. 884.)

1 The state appellate court rejected petitioner's claim. It stated that the trial court permitted
2 counsel to argue that petitioner was only guilty of assisting after-the-fact, but could not argue the
3 theory as "accessory after the fact" because that particular phrase was neither charged nor
4 defined. (Resp. Ex. I, p. 32.) Subsequently, counsel did just that and argued that petitioner was
5 not guilty of murder or robbery unless the jury found that he participated in the murder or
6 robbery prior to the acts. (Id.)

7 A review of the record demonstrates that the state court's determination was reasonable.
8 Defense counsel was able to argue the theory of defense, i.e., that petitioner was only involved in
9 covering up the crimes but did not participate in the crimes themselves, and thus, petitioner
10 could not be found guilty of murder or robbery. Because being an "accessory after the fact" was
11 not a lesser included offense of any of the charged crimes, nor was it a legal defense to any
12 charged crime, and because petitioner was able to thoroughly argue that he was merely an
13 "accessory after the fact" in closing argument without using that specific legal phrasing,
14 petitioner is not entitled to habeas relief on this claim. Cf. Hopkins v. Reeves, 524 U.S. 88
15 (1998) (holding that the Constitution does not require the jury to be instructed on offenses that
16 are not lesser-included offenses of the charged crimes); Solis v. Garcia, 219 F.3d 922, 929 (9th
17 Cir. 2000) (failure to instruct on lesser-included offenses is not a constitutional error).

18 Accordingly, the court concludes that the state appellate court's decision regarding an
19 alleged omission of a jury instruction was not contrary to, or an unreasonable application of
20 clearly established federal law, nor was it an unreasonable determination of the facts in light of
21 the evidence presented. 28 U.S.C. § 2254(d)(1), (2).

22 13. Victim impact evidence

23 Petitioner claims that the testimony of the victim's ex-wife to identify a photograph of
24 the victim and testify about their relationship and other irrelevant matters. (Petition at 15-1.)
25 Petitioner further alleges that this "victim impact" testimony violated his due process rights
26 because it was designed to elicit the sympathy of the jury. (Petition at 15-1.)

27 The admission of evidence is not subject to federal habeas review unless a specific
28 constitutional guarantee is violated or the error is of such magnitude that the result is a denial of

1 the fundamentally fair trial guaranteed by due process. See Henry v. Kernan, 197 F.3d 1021,
2 1031 (9th Cir. 1999). In order to obtain habeas relief on the basis of an evidentiary error, a
3 petitioner must show that the error was one of constitutional dimension and that it was not
4 harmless under Brecht v. Abrahamson, 507 U.S. 619 (1993). He would have to show that the
5 error had “a substantial and injurious effect on the verdict.” Brecht, 507 U.S. at 623.

6 The state appellate court rejected petitioner’s claim both because he failed to make a
7 contemporaneous objection and, therefore, waived the issue on appeal, and also because any
8 error was harmless. (Resp. Ex. I, p. 36-37.) Specifically, the appellate court stated that it was
9 undisputed that the victim was killed, so any sympathy garnered by the witness was not likely to
10 prejudice the defendant, and the main issue at hand was whether defendant or Ryan killed the
11 victim. (Id. at 37.) Therefore, the court stated, the testimony of the ex-wife was unlikely to have
12 affected the verdict. (Id.)

13 Here, as explained above, because California’s contemporaneous objection rule is an
14 independent and adequate procedural bar, and petitioner gives no reason for cause or prejudice,
15 the court concludes that this issue is procedurally defaulted. See Coleman, 501 U.S. at 750.
16 Alternatively, any error in admitting the testimony was harmless in light of the fact that the
17 victim’s ex-wife’s testimony was extremely brief, gave basic information about the victim, e.g.,
18 how long they had been friends, where the victim planned to vacation, what the victim did for a
19 living, and whether he was being treated for any medical issues (RT 1177-78), it is implausible
20 that such testimony would elicit sympathy from the jury such as to substantially affect the
21 verdict. See Brecht, 507 U.S. at 623.

22 Accordingly, the court concludes that the state appellate court’s decision regarding the
23 admission of victim impact testimony was not contrary to, or an unreasonable application of
24 clearly established federal law, nor was it an unreasonable determination of the facts in light of
25 the evidence presented. 28 U.S.C. § 2254(d)(1), (2).

26 14. Cumulative error

27 Petitioner claims, in general, that he was deprived of a fair trial, in light of the cumulative
28 effect of all the claims raised. (Petition at 16-1.) However, where, as here, there is no single

1 constitutional error existing, nothing can accumulate to the level of a constitutional violation.

2 See Mancuso v. Olivarez, 292 F.3d 939, 957 (9th Cir. 2002).

3 Accordingly, the court concludes that the state appellate court's decision regarding the
4 cumulative of any error was not contrary to, or an unreasonable application of clearly established
5 federal law, nor was it an unreasonable determination of the facts in light of the evidence
6 presented. 28 U.S.C. § 2254(d)(1), (2).

7 **CONCLUSION**

8 For the foregoing reasons, the petition for a writ of habeas corpus is DENIED. The Clerk
9 shall enter judgment for Respondent and close the file.

10 IT IS SO ORDERED.

11 Dated: 12/22/08


RONALD M. WHYTE
United States District Judge